**The R. T. Jones Lumber Company, Inc.** ***and*** **International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO.** Case 3–CA–17346

February 28, 1994

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

On a charge filed by the Union on September 14, 1992, and subsequently amended on September 17 and October 29, 1992, the General Counsel of the National Labor Relations Board issued a complaint on October 30, 1992, and subsequently amended it on November 6, 1992, against The R. T. Jones Lumber Company, Inc. (fiMDBUfl*ERR17*fiMDNMflthe Respondent)fiMDBUfl*ERR17*fiMDNMfl. The amended complaint alleges that the Respondent has violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl1)fiMDBUfl*ERR17*fiMDNMfl of the National Labor Relations Act by failing and refusing to make contractually required contributions to the Union's pension fund and group health insurance payments. Thereafter, the Respondent filed a timely answer admitting in part and denying in part the allegations in the complaint. The Respondent also asserted two affirmative defenses: first, that the alleged unfair labor practices constitute contract disputes suitable for deferral to arbitration and second, that the Respondent's filing of a bankruptcy petition on July 10, 1992, stays the Board's proceedings.

On June 16, 1993, the General Counsel, the Respondent, and the Charging Party filed a stipulation of facts and motion to transfer proceeding to the Board. The parties agreed that the charges, complaints, answers, and the stipulation of facts and exhibits attached thereto constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties further stipulated that they waived a hearing before an administrative law judge, the making of findings of fact and conclusions of law by an administrative law judge, and the issuance of a decision by an administrative law judge. The parties stated their desire to submit this case directly to the Board for findings of fact, conclusions of law, and the issuance of a Decision and Order.

On August 25, 1993, the Board issued an Order approving the stipulation and transferring the proceeding to the Board. The Respondent and the General Counsel timely submitted briefs.

On the entire record and the briefs, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent, The R. T. Jones Lumber Company, Inc., is a manufacturer of wirebound boxes and crates with a facility in North Tonawanda, New York. In conducting its business operations, the Respondent annually purchases and receives at its North Tonawanda facility goods and materials valued in excess of $50,000 directly from points outside the State of New York.

Based on the stipulation of the parties, we find that The R. T. Jones Lumber Company is an employer engaged in commerce within the meaning of Section 2(fiMDBUfl*ERR17*fiMDNMfl2)fiMDBUfl*ERR17*fiMDNMfl, (fiMD labor organization within the meaning of Section 2(fiMDBUfl*ERR17* of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICE

#### A. *Facts*

At all material times, Local 357 of the Union (fiMDBUfl*ERR17*fiMDNMfl1)fiMDBUfl*ERR17*fiMDNMfl has been the designated exclusive bargaining representative of the Respondent's employees in the following appropriate unit:

> All production and maintenance employees of Respondent, except office and clerical employees, guards and watchmen, and all professional and supervisory employees as defined in the Act.

The Respondent has entered into successive collective-bargaining agreements with the Union, the most recent of which is effective from March 16, 1993, to March 15, 1996. A predecessor agreement was effective from March 16, 1990, to March 15, 1993.

Article XXII of the 1990–1993 agreement provided, in pertinent part:

> Section 1.
>
> The Company agrees to continue to contribute to the Pension Plan as follows:
>
> First year $.24, second year $.27, third year $.31 per hour for each hour for which said employees receives [sic] pay during the life of this agreement.
>
> Section 2
>
> Newly hired Group 5 employees will not receive Pension contributions until 1st years of employment.

Article XXII of the current agreement provides, in pertinent part:

> Section 1. The Company agrees to continue to contribute to the Pension Plan as follows:
>
> $.31 for each hour for which said employee receives pay for the life of this agreement.
>
> Section 2. Newly hired Group 5 employees will not receive Pension contributions until 1st year of employment.

In two memoranda of agreement, dated March 15, 1990, and March 15, 1993, the Respondent and the Union agreed that the pension fund payments ''shall be made monthly and shall be due on or before the 10th day of the month following the calendar month in which the employee receives said hourly pay.'' It is undisputed that the Respondent failed to make the required pension fund contributions covering the months of February 1992[1] through June 1992 and failed to make the required pension fund contributions in a timely manner covering the months of July 1992 through April 1993, excluding November 1992.

Article XIII, section 1 of the 1990–1993 agreement provides, in pertinent part:

> The Company agrees to pay for all employees, when qualified, one-hundred percent (fiMDBUfl*ERR17*fiMDNMfl100%)fiMDBUfl*ERR17*fiMDNMfl of the cost for individual and family coverage under Blue Cross with the following coverage: Blue Cross 4/5 Blue Cross select classes 90/91, Blue Cross Rider #40 precare, major medical 1,000,000 with R/X rider $100.00 deductible, R/X rider with contraceptives $5.00 co-pay.

Article XIII of the current agreement provides, in pertinent part:

> Section 1. The Company agrees to pay for all employees, when qualified, one-hundred percent (fiMDBUfl*ERR17*fiMDNMfl100%)fiMDBUfl*ERR17*fiMDNMfl of the cost for individual or family coverage.
>
> 1. Under Blue Cross with the following coverage: Blue Cross hospitalization 04/06 rider 40 precare program, Blue Cross medical/surgical 90/91, unlimited major medical $250.00 deductible for single and $500.00 deductible for family, prescription drug rider $9.00 co-pay with contraceptives.
>
> 2. Under Community Blue Secure with the following coverage: 100% hospitalization, $10.00 co-pay per visit, and $7.00 prescription co-pay.
>
> 3. Under Health Care Plan with the following coverage: $2.00 co-pay per visit, and $3.00 prescription co-pay, 50% co-pay for infertility drugs.
>
> Each employee may choose any of the above coverages. They may change coverages once a year or at other times by mutual agreement.
>
> New employees will be covered on the first (fiMDBUfl*ERR17*fiMDNMfl1st)fiMDBUfl*ERR17*fiMDNMfl day of the month following the month in which their 120 working day probationary period expires.

It is undisputed that on or about August 1, 1992, the Respondent failed to make the required premium payments to the specified health plan carriers for the employees' group health insurance. However, during the period August 1, 1992, to September 23, 1992, the Respondent took steps to meet the carriers' conditions for continuation of its employees' group health insurance. The Respondent's failure to pay the required premiums did not result in any of the Respondent's employees incurring any unreimbursed, out-of-pocket expenses for covered medical care or services.

### B. *Contentions of the Parties*

The General Counsel contends that the Respondent's failure to make these contractually mandated pension and health insurance payments violates Section 8(fiMDBUfl*ERR17*fiMDNMfl1)fiMDBUfl*ERR17*fiMDNMfl of and (fiMDBUfl*ERR17*fiMDNMfl1)fiMDBUfl*ERR17*fiMDNMfl of urges rejection of the Respondent's affirmative defenses asserted in the Respondent's answer, contending that the dispute is inappropriate for deferral for arbitration and that Section 362(fiMDBUfl*ERR17*fiMDNMflb)fiMDBUfl* Code provides that its automatic stay does not apply to ''an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.'' 11 U.S.C. § 362(fiMDBUfl*ERR17*fiMDNMflb)fiMDBUfl*ER

In its brief, the Respondent states that it ''recognizes that, among other things, it is obligated to make payments'' to the pension fund and asserts only that any make-whole remedy imposed by the Board should be consistent with and subject to the Bankruptcy Code's payment priorities and limitations.

### C. *Discussion and Conclusion*

It is well established that the failure to make timely contractually required fringe benefits and health insurance premium payments, without consent of the Union, constitutes a unilateral modification of in the terms of the collective-bargaining agreement and that such an unilateral modification is a violation of Section 8(fiMDBUfl*ERR17*fiM and (fiMDBUfl*ERR17*fiMDNMfl1)fiMDBUfl*ERR17*fiMDNMfl of NLRB 1018 (fiMDBUfl*ERR17*fiMDNMfl1992)fiMDBUfl*ERR17*fiM *ing,* 302 NLRB 856, 857 (fiMDBUfl*ERR17*fiMDNMfl1991)fiMDBUfl

We find no merit in the Respondent's asserted defenses. Deferral to arbitration is inappropriate in this case because the Respondent's admitted breach of the collective-bargaining agreement does not involve a [illegible] competence of an arbitrator. *Struthers Wells Corp.,* 245 NLRB 1170, 1171 fn. 4 (fiMDBUfl*ERR17*fiMDNMfl1979)fiMDBUf (fiMDBUfl*ERR17*fiMDNMfl3d Cir. 1980)fiMDBUfl*ERR17*fiMDNM

Further, as to the Respondent's contention that the Board's proceedings are stayed by its bankruptcy petition, the Bankruptcy Code Section 362(fiMDBUfl*ERR17*fiMDN U.S.C. § 362(fiMDBUfl*ERR17*fiMDNMflb)fiMDBUfl*ERR17*fiMDN matic stay does not apply to ''an action or proceeding by a governmental unit to enforce such governmental

[1] It appears that the Respondent's failure to make the pension payment covering February 1992 (fiMDBUfl*ERR17*fiMDNMfldue March 10)fiMDBUfl*ERR17*fiMDNMfl, is outside of the 6-month limitations period contained in Sec. 10(fiMDBUfl*ERR17*fiMDNMflb)fiMDBUfl*ERR17*fiMDNMfl of the Act. See 10(fiMDBUfl*ERR17*fiMDNMflb)fiMDBUfl*ERR17*fiMDNMfl, however, is an affirmative defense which the Respondent has waived by not timely raising it. *Federal Management Co.,* 264 NLRB 107 (fiMDBUfl*ERR17*fiMDNMfl1982)fiMDBUfl*ERR17*fiMDNMfl.

unit's police or regulatory power.'' *Sonya Trucking Co.*, 312 NLRB 1159 (fiMDBUfl*ERR17*fiMDNMfl1993)fiMDBUfl*ERR17*fiMDNMfl; *Super Carbide Tools*, 307 NLRB 1052 fn. 1 (fiMDBUfl*ERR17*fiMDNMfl1992)fiMDBUfl*ERR17*fiMDNMfl.

We also find no merit in the Respondent's contention that the make-whole remedy issued by the Board must be consistent with and subject to the payment priorities of the Bankruptcy Code. Under Bankruptcy Code Section 362(fiMDBUfl*ERR17*fiMDNMflb)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl4)fiMDBUfl*ERR17 process an unfair labor practice case to its final disposition, including determination of such monetary amounts as may be owed as a result of the unfair labor practices, although the subsequent collection of the moneys owed requires a separate application to the bankruptcy court. *Sonya Trucking Co.*, supra; *NLRB v. 15th Avenue Iron Works*, 964 F.2d 1336, 1337 (fiMDBUfl*ERR17*fiMDNMfl2d Cir. 1992)fiMDBUfl*ERR17*fiMDNMfl; *NLRB v. Continental Heller Corp.*, 922 F.2d 828, 832–835 (fiMDBUfl*ERR17*fiMDNMfl9th Cir. 1991)fiMDBUfl*ERR17*fiMDNMfl; *NLRB v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 512 (fiMDBUfl*ERR17*fiMDNMfl7th Cir. 1991)fiMDBUfl*ERR17*fiMDNMfl.

Accordingly, in view of the Respondent's admitted failure to make the contractually required payments to the pension funds and to the health plan carriers, we find that the Respondent has violated Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17 and (fiMDBUfl*ERR17*fiMDNMfl1)fiMDBUfl*ERR17*fiMDNMfl of the Act.

## CONCLUSION OF LAW

By failing to make the contractually required payments to the pension fund and for health care coverage, the Respondent has committed unfair labor practices affecting commerce within the meaning of Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNMfl(fiMDBUfl*ERR17*fiMDNMfl5)fiMDBUfl*ERR17*fiMDNMfl of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to restore the status quo ante in effect prior to the unilateral changes made in the employees' terms and conditions of employment. In this regard, we shall order the Respondent to make the pension fund contributions which have been unlawfully withheld pursuant to the collective-bargaining agreement between the Respondent and the Union, with any additional sums applicable to the payments to be computed in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213 (fiMDBUfl*ERR17*fiMDNMfl1979)fiMDBUfl*ERR17*fiMDNMfl.[2]

[2] The parties have stipulated that the Respondent restored health coverage and that no employee incurred any out-of-pocket expenses during the time that the Respondent had failed to make the required insurance premiums. Additionally, the General Counsel contends that for this reason, ''no make-whole remedy lies.'' Given these circumstances, we shall not provide any affirmative provisions regarding the Respondent's failure to make payments for health care coverage.

## ORDER

The National Labor Relations Board orders that the Respondent, The R. T. Jones Lumber Co., Inc., North Tonawanda, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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make contractually required payments to the Union's pension fund or to the health plan carriers for health care coverage for its unit employees.

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restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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been unlawfully withheld, pursuant to the collective-bargaining agreement between the Respondent and the Union, in the manner set forth in the remedy section of this decision.

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Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

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York, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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20 days from the date of this Order what steps the Respondent has taken to comply.

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local Union No. 357 of the International Union of Electronic, Elec-

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

trical, Salaried, Machine and Furniture Workers, AFL–CIO, the exclusive collective-bargaining representative of our employees in an appropriate unit, by failing to make contractually required payments to the Union's pension fund or to health plan carriers for health care coverage. The appropriate unit is:

> All production and maintenance employees of Respondent, except office and clerical employees, guards and watchmen, and all professional and supervisory employees as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make the pension fund contributions which we have unlawfully withheld pursuant to the collective-bargaining agreement between ourselves and the Union.

THE R. T. JONES LUMBER COMPANY, INC.